

EXHIBIT 1

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FOR THE DISTRICT OF MASSACHUSETTS

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IN RE: PHARMACEUTICAL : MDL NO. 1456

INDUSTRY AVERAGE WHOLESALE : CIVIL ACTION

PRICE LITIGATION : 01-CV-12257-PBS

THIS DOCUMENT RELATES TO :

U.S. ex rel. Ven-a-Care of : Judge Patti B. Saris

the Florida Keys, Inc. :

v. :

Abbott Laboratories, Inc., : Chief Magistrate

No. 06-CV-11337-PBS : Judge Marianne B.

- - - - -x Bowler

(CROSS NOTICED CAPTIONS ON FOLLOWING PAGES)

Videotaped deposition of DR. ROBERT BERENSON

Volume I

Washington, D.C.

Wednesday, December 18, 2007

10:10 a.m.

<p style="text-align: right;">Page 126</p> <p>1 444.</p> <p>2 (Exhibit Abbott 444 was</p> <p>3 marked for identification.)</p> <p>4 MR. LIBMAN: For the benefit of those on</p> <p>5 the phone, would you mind either identifying either</p> <p>6 by Bates number or date, the documents you're marking</p> <p>7 so we know what they are?</p> <p>8 MR. MURRAY: Sure, of course. I'm handing</p> <p>9 him now what we are marking as 444, which is a</p> <p>10 document Bates labeled HHC 001-0661.</p> <p>11 BY MR. MURRAY:</p> <p>12 Q. And ask if you've ever seen this before?</p> <p>13 A. No. Not that I remember.</p> <p>14 Q. Okay. Who is Beverly Parker?</p> <p>15 A. I don't know.</p> <p>16 Q. Do you know who R. Niemann is?</p> <p>17 A. Yes. Bob Niemann was the person I looked</p> <p>18 to as my technical drug expert, drug pricing expert.</p> <p>19 Q. And this appears to be an email from June</p> <p>20 27th of 2000 from Mr. Niemann to Ms. Parker,</p> <p>21 indicating you have a meeting and requesting some</p> <p>22 things in preparation for that meeting, including a</p>	<p style="text-align: right;">Page 128</p> <p>1 I don't know.</p> <p>2 Q. Okay. She lists some other people to be</p> <p>3 cc'd with this information. And let me just ask you,</p> <p>4 do you know who Mark Miller was?</p> <p>5 A. Yes, I do.</p> <p>6 Q. And who was he?</p> <p>7 A. Mark Miller by then had come in to replace</p> <p>8 Kathy Buto as my deputy.</p> <p>9 Q. Okay. And how about S. --</p> <p>10 A. Stewart Streimer was another senior person</p> <p>11 in my immediate office.</p> <p>12 Q. How about J. Sanow?</p> <p>13 A. She -- I forget her first name -- had</p> <p>14 something to do -- I don't -- she worked for</p> <p>15 Gustafson, and I don't really know in what way.</p> <p>16 Q. How about L. McWright?</p> <p>17 A. She was my -- Laurie McWright was my</p> <p>18 special assistant.</p> <p>19 Q. And what sorts of issues did she deal</p> <p>20 with?</p> <p>21 A. She was a special assistant. She is like</p> <p>22 a -- she deals with everything that I deal with,</p>
<p style="text-align: right;">Page 127</p> <p>1 latest version of the AWP PM. Let me stop right</p> <p>2 there. Do you know what Ms. Parker might be</p> <p>3 referring to there?</p> <p>4 A. I assume the program memorandum.</p> <p>5 Q. And then a state summary of Medicaid</p> <p>6 experience with OIG list prices. Do you know what</p> <p>7 she is referring to there?</p> <p>8 A. No.</p> <p>9 Q. Have you ever seen a state summary of</p> <p>10 Medicaid experience with OIG list prices?</p> <p>11 A. I have a vague recollection, but I'm not</p> <p>12 -- I can't recall really any details.</p> <p>13 Q. And then third is an A 19, re, use of</p> <p>14 acquisition cost. Do you know what an A 19 is?</p> <p>15 A. No.</p> <p>16 Q. Okay. Do you have any idea -- it</p> <p>17 indicates you need these things for a meeting. Do</p> <p>18 you have any idea what kind of meeting she is talking</p> <p>19 about?</p> <p>20 A. No. I mean, as I said earlier, I had an</p> <p>21 ASCO meeting, I'm pretty sure. And whether this is</p> <p>22 related to that or whether it's an internal meeting,</p>	<p style="text-align: right;">Page 129</p> <p>1 helps me get ready for meetings, calls people on my</p> <p>2 behalf, pulls stuff together. So she dealt with</p> <p>3 everything that I would deal with, and she was an</p> <p>4 assistant to me and Mark Miller so --</p> <p>5 Q. And T. Gustafson?</p> <p>6 A. Tom Gustafson was the head of the group</p> <p>7 that was in charge of acute care payment policy,</p> <p>8 which would include Part B drugs.</p> <p>9 Q. And how about P. Patel?</p> <p>10 A. Parashar Patel was the head of one of Tom</p> <p>11 Gustafson's branches which -- which was in charge of</p> <p>12 physician payment. And I assume Part B drugs would</p> <p>13 have been under his jurisdiction.</p> <p>14 Q. And then at the bottom, in a line labeled</p> <p>15 CC, there is also a T. Hefter. Do you know who that</p> <p>16 is?</p> <p>17 A. Tzvi, Tzvi Hefter and Steve Phillips.</p> <p>18 They both worked in Gustafson's shop somewhere.</p> <p>19 Steve Phillips was in charge of hospital payment</p> <p>20 policy and Tzvi Hefter, I worked with on those</p> <p>21 issues, but I'm sure he had a broader portfolio than</p> <p>22 that.</p>

<p style="text-align: right;">Page 150</p> <p>1 Q. And I guess that's what I'm just trying to 2 understand is, if you don't know what the methodology 3 was, what other factors led you to become comfortable 4 with these DOJ AWP's being a good source? 5 A. Rely -- my reliance on staff who were 6 telling me that they were a good source. 7 Q. And do you have -- did staff ever 8 communicate to you why they thought it was a good 9 source? 10 A. Are we getting into a -- into an area 11 here? 12 MR. DRAYCOTT: Well, if you need to confer 13 -- 14 THE WITNESS: I don't think so. I mean, 15 no. The simple answer is no. I had a lot of 16 confidence in Bob Niemann, who was the point person 17 on drugs. And he, I was looking to, along with his 18 staff. 19 MR. DRAYCOTT: Again, you can't go into 20 the deliberations, but you can come up -- if there is 21 a -- if you know what their rationale was for making 22 the final decision, you can state it. Beyond that,</p>	<p style="text-align: right;">Page 152</p> <p>1 question. 2 MR. MURRAY: Yes. It's a different 3 question. 4 MR. DRAYCOTT: Okay. 5 THE WITNESS: Not that I recall. 6 BY MR. MURRAY: 7 Q. Let me hand you what we've previously 8 marked as 148. And ask if you've ever seen that 9 before? 10 MR. LIBMAN: Brian, did you say 148? 11 MR. MURRAY: 148. Sorry. Thank you. 12 MR. LIBMAN: All right. 13 THE WITNESS: No. I haven't. I don't 14 remember having seen it. 15 BY MR. MURRAY: 16 Q. It's a letter to state Medicaid pharmacy 17 directors. It appears to be a form letter of sorts 18 from the ASCP, American Senior Care Pharmacists. And 19 in the last paragraph, they appear to be expressing a 20 concern that "a benchmark developed solely for the 21 Medicaid program through a methodology distinct from 22 that used to determine the regular AWP is at odds</p>
<p style="text-align: right;">Page 151</p> <p>1 and with respect to any deliberations that preceded 2 that decision, I instruct you not to answer. 3 THE WITNESS: Okay. 4 BY MR. MURRAY: 5 Q. So basically your staff told you that this 6 was a good source, and that was enough for you? 7 A. Sure. 8 Q. Okay. 9 MR. DRAYCOTT: State an objection to the 10 last question for the record. 11 BY MR. MURRAY: 12 Q. Okay. Did anyone ever indicate to you 13 that using the DOJ AWP's might create legal problems 14 on the Medicaid side? 15 MR. DRAYCOTT: Objection. And can you 16 repeat the question? 17 BY MR. MURRAY: 18 Q. Let me ask it this way. Did anyone 19 outside of government ever express any concern to you 20 that using the DOJ AWP's might create legal problems 21 on the Medicaid side? 22 MR. DRAYCOTT: Which is a different</p>	<p style="text-align: right;">Page 153</p> <p>1 with the laws governing reimbursement for 2 pharmaceuticals under state medical assistance 3 programs based on a single published AWP." Do you 4 remember that concern ever being expressed to you? 5 MR. DRAYCOTT: You can state that -- 6 whether or not the concern was expressed in some way 7 or back to the time -- 8 THE WITNESS: This one is easy, because I 9 don't remember any such expression. 10 BY MR. MURRAY: 11 Q. Let me read the next sentence. "At a 12 minimum, such a separate Medicaid AWP undercuts the 13 principle embodied in the statutes and regulations 14 governing most state medical assistance programs, 15 that reimbursement for Medicaid covered services will 16 be based on commercial norms in the health care 17 industry." Let me break that into a couple parts. 18 First of all, do you remember this concern ever being 19 expressed to you? 20 MR. DRAYCOTT: You can state -- you can 21 answer the question to the extent that you can state 22 whether or not this concern found expression or</p>

<p style="text-align: right;">Page 182</p> <p>1 A. Yes.</p> <p>2 Q. And you say, "we plan to take</p> <p>3 administrative action on chemotherapy administration</p> <p>4 payments and work with Congress to enact legislation</p> <p>5 regarding clotting factors." Do you know whether CMS</p> <p>6 actually took the administrative action you're</p> <p>7 talking about here?</p> <p>8 A. Well, I think the first part of that</p> <p>9 sentence was the program memorandum, that we've</p> <p>10 already talked about.</p> <p>11 Q. Right.</p> <p>12 A. So -- so the answer is, I mean, I think</p> <p>13 you're asking, did we issue the program memorandum</p> <p>14 and we did.</p> <p>15 Q. Actually, I'm asking a slightly different</p> <p>16 question. Where you say after that, we plan to take</p> <p>17 administrative action on chemotherapy administration</p> <p>18 payments?</p> <p>19 A. Oh. That was to be in 2001 in the</p> <p>20 physician payment rule. And I was gone and I don't</p> <p>21 honestly know -- I think they had troubles trying to</p> <p>22 implement that policy, but I no longer was there and</p>	<p style="text-align: right;">Page 184</p> <p>1 previously as 221, and ask if you've seen this</p> <p>2 before?</p> <p>3 A. I don't think I've seen it before. I'm</p> <p>4 aware of its existence.</p> <p>5 Q. This is another program memorandum to the</p> <p>6 intermediaries and carriers dated November 17th of</p> <p>7 2000. And it indicates that this program memorandum</p> <p>8 suspends the PMAB-00-86 dated September 8th, 2000,</p> <p>9 and then continues, "this is to notify you that you</p> <p>10 should not use the DOJ data," the DOJ AWP's, I'm</p> <p>11 paraphrasing now, in your next update of the Medicare</p> <p>12 payment allowances. Do you remember why -- so let me</p> <p>13 understand this, and strike all that and I'll back</p> <p>14 up.</p> <p>15 So is it your understanding then that the</p> <p>16 carriers never did actually consider the DOJ AWP's in</p> <p>17 setting Medicare reimbursement?</p> <p>18 A. Well, it was to go into effect the</p> <p>19 following year, so I don't believe it was ever --</p> <p>20 they may have been doing some preliminary work, but I</p> <p>21 don't -- I'm pretty sure it was never implemented.</p> <p>22 Q. And do you know why CMS decided to pull</p>
<p style="text-align: right;">Page 183</p> <p>1 have no direct knowledge of what they did.</p> <p>2 Q. All right. Did you draft this language</p> <p>3 that we have been reading?</p> <p>4 A. I doubt that I wrote it.</p> <p>5 Q. Okay. Some of the same language shows up</p> <p>6 in the letter from Administrator DeParle to Congress</p> <p>7 before, and I was just trying to figure out if you</p> <p>8 knew who was the drafter of the language.</p> <p>9 A. It's consistent with my point of view at</p> <p>10 the time, but I don't remember actually being the</p> <p>11 person sitting at the typewriter or at the keyboard.</p> <p>12 Q. Could it have been someone in your staff?</p> <p>13 A. It could well have been somebody in my</p> <p>14 staff. This probably would have been produced, both</p> <p>15 the letter from Miss DeParle and this letter would</p> <p>16 have been produced by my executive secretariat, which</p> <p>17 drafts letters. And I'm sure we had something to do</p> <p>18 with it, with the letter.</p> <p>19 Q. Last but not least, do you have the book</p> <p>20 that has 221 in it?</p> <p>21 A. This one.</p> <p>22 Q. So showing you what's been marked</p>	<p style="text-align: right;">Page 185</p> <p>1 its AWP's in this memo?</p> <p>2 A. I don't remember the details. I knew that</p> <p>3 the Congress was getting heavily involved and was</p> <p>4 preparing -- whether they had prepared or were going</p> <p>5 to prepare legislation to prevent us from doing this.</p> <p>6 And they were going to take this issue on themselves.</p> <p>7 And in the face of that reality, I think we -- we</p> <p>8 backed off. The Congress basically said, we are</p> <p>9 going to deal with this issue.</p> <p>10 Q. Do you know, did anyone from -- well,</p> <p>11 strike that. Did you have any discussions with</p> <p>12 Congress as to why they might prevent you from doing</p> <p>13 this?</p> <p>14 A. I can't remember that I -- I had any</p> <p>15 particular -- I don't remember personally having</p> <p>16 discussions. I know that we were -- there were a lot</p> <p>17 of congressional letters coming in. I didn't</p> <p>18 personally, that I can remember, have conversations</p> <p>19 with -- with staff.</p> <p>20 Q. Do you recall any reasons Congress</p> <p>21 expressed as to why they might prevent you from doing</p> <p>22 this?</p>

<p style="text-align: right;">Page 186</p> <p>1 A. They were hearing the same thing from 2 affected parties that were reflected in these 3 letters, both complaining about access problems and 4 alleged mistakes in how it was being implemented. 5 And Congress is always concerned when they hear about 6 access problems, so it was becoming a very big 7 political issue. 8 Q. Had you had concerns -- any concerns by 9 any pharmaceutical manufacturer with respect to 10 implementing the DOJ AWP's? 11 A. Not -- not that I can remember. 12 Q. Okay. I think that's all I've got. Can 13 we take a short break? 14 THE VIDEOGRAPHER: This is the end of tape 15 three. Off the record at 4:37. 16 (Recess.) 17 THE VIDEOGRAPHER: This is the beginning 18 of tape number four in the deposition of 19 Dr. Berenson. On the record at 2:43. 20 BY MR. MURRAY: 21 Q. Doctor, this is Brian again. You had 22 indicated right before we came back from break that</p>	<p style="text-align: right;">Page 188</p> <p>1 rescinded the use of the DOJ AWP's. Do you have any 2 recollection at all of how you first learned that you 3 weren't going to be using those or recommending that 4 those AWP's be used any more? 5 MR. LIBMAN: Objection. Mr. Libman. 6 Asked and answered. 7 THE WITNESS: I don't remember any more 8 details about -- I certainly don't remember when I 9 first learned about it. I probably had something to 10 do with participating in a discussion to -- that 11 resulted in the issuance of that memorandum. 12 BY MR. MERKL: 13 Q. So the decision to issue the memorandum 14 was a decision made by CMS as opposed to a directive 15 received from Congress? 16 MR. DRAYCOTT: Objection. 17 THE WITNESS: I believe we did it on our 18 own with -- understanding that Congress would have so 19 directed us if we hadn't done it, but I may be wrong 20 on that. 21 BY MR. MERKL: 22 Q. Who is we?</p>
<p style="text-align: right;">Page 187</p> <p>1 you had remembered the name of that center? 2 A. Yes, the center that had the 3 organizational responsibility for sending out program 4 memoranda was the Center for Beneficiary Services. 5 MS. ALBEE: Excuse me, this is Mrs. Albee. 6 Could the questioner please speak a little louder? 7 MR. MURRAY: Perfect. Sorry. We have 8 actually switched chairs here in D.C. That was my 9 last question. I'm going to pass the witness over to 10 Mr. Neil Merkl, who would like to ask you a few 11 questions. Thank you, Doctor. 12 EXAMINATION BY COUNSEL FOR DEFENDANT DEY 13 BY MR. MERKL: 14 Q. Good afternoon, Doctor. Doctor, my name 15 is Neil Merkl. I represent a company called Dey, 16 D-E-Y. Have you ever had any dealings with Dey? 17 A. No. 18 Q. And you never communicated with Dey in 19 your professional capacity at CMS/HCFA? 20 A. Not that I can remember. 21 Q. When we were talking about Exhibit 221 a 22 minute ago, that was the program memoranda that</p>	<p style="text-align: right;">Page 189</p> <p>1 A. We meaning the senior leadership at the 2 time. We are now talking about November, so I would 3 have been in that senior leadership. I don't 4 remember who else would have been involved in such 5 discussions at this time. I don't remember. 6 At that point, I was the acting deputy 7 administrator, and had moved from my position as 8 center director, and don't have a good memory as to 9 specifically what Congress's actions were, but it was 10 -- I do remember that Congress really had felt that 11 our program memorandum was -- was something they 12 wanted to suspend. And I think we anticipated that 13 and withdrew it on our own. But -- so that the 14 Congress indicated their own preference for taking up 15 the issue. 16 Q. You say the Congress felt and the Congress 17 indicated. How was it you became aware of Congress's 18 feelings and indications? 19 A. I don't remember any of the details about 20 it. I'm sure there were -- typically, I don't know 21 in this case, typically there are phone calls and 22 letters that are exchanged between, in some cases,</p>

<p style="text-align: right;">Page 246</p> <p>1 A. Deep discounts.</p> <p>2 Q. Okay. And you did not oppose -- well, and</p> <p>3 that eventually, HCFA decided it was not going to</p> <p>4 require physicians and their providers to reimburse</p> <p>5 at the lower rate proposed by the DOJ, correct?</p> <p>6 MR. DRAYCOTT: Objection.</p> <p>7 THE WITNESS: As we talked about earlier,</p> <p>8 we -- Congress indicated that they didn't want us to</p> <p>9 act in that area. And so we did not act in that</p> <p>10 area, but not necessarily because of the merits, but</p> <p>11 because of the politics.</p> <p>12 BY MR. MERKL:</p> <p>13 Q. When you say the politics, you know,</p> <p>14 Congress is in charge, right, ultimately?</p> <p>15 A. Yes. Congress is in charge ultimately.</p> <p>16 Right.</p> <p>17 Q. All right. And in either case, it was a</p> <p>18 decision independently arrived at by HCFA to stick</p> <p>19 with reimbursing Medicare at 95 percent of AWP, even</p> <p>20 though HCFA knew that Albuterol and cromolyn and</p> <p>21 other inhalant drugs were available at margins</p> <p>22 substantially below AWP, correct?</p>	<p style="text-align: right;">Page 248</p> <p>1 periodical, I think it's the Blue Book?</p> <p>2 A. No. I'm not aware of that.</p> <p>3 Q. And are you aware whether or not WACs are</p> <p>4 consistently higher or lower than AWP?</p> <p>5 A. I have no knowledge of WACs.</p> <p>6 Q. Have you ever heard the term AMP?</p> <p>7 A. Average manufacturer's price.</p> <p>8 Q. Average manufacturer's price?</p> <p>9 A. I've heard the term.</p> <p>10 Q. What is your understanding of that term?</p> <p>11 A. Actually, I can't tell you that. I don't</p> <p>12 have an understanding at this moment.</p> <p>13 Q. Are you aware that manufacturers of</p> <p>14 pharmaceuticals report AMPs for each NDC number drug</p> <p>15 that they sell as part of the Medicaid program?</p> <p>16 A. No. I'm not.</p> <p>17 Q. In the course of your duties at HCFA/CMS,</p> <p>18 did you ever have occasion to look at AMPs?</p> <p>19 A. Not that I can remember.</p> <p>20 Q. Were you aware of the existence of the AMP</p> <p>21 information?</p> <p>22 A. From Medicaid?</p>
<p style="text-align: right;">Page 247</p> <p>1 MR. DRAYCOTT: Objection.</p> <p>2 MS. ALBEE: Objection. This is</p> <p>3 Mrs. Albee.</p> <p>4 THE WITNESS: HCFA made a decision not to</p> <p>5 implement that particular program memorandum that</p> <p>6 would have reduced reimbursement.</p> <p>7 BY MR. MERKL:</p> <p>8 Q. With the knowledge that the providers were</p> <p>9 able to obtain those inhalant drugs at numbers</p> <p>10 substantially below AWP, correct?</p> <p>11 MR. DRAYCOTT: Objection.</p> <p>12 THE WITNESS: Correct.</p> <p>13 BY MR. MERKL:</p> <p>14 Q. Are you familiar with the term -- it's an</p> <p>15 acronym, WAC, W-A-C, it stands for wholesale</p> <p>16 acquisition cost?</p> <p>17 A. I think I've seen it, but I couldn't tell</p> <p>18 you the definition at this moment.</p> <p>19 Q. Well, are you aware that WAC also is a</p> <p>20 published price for drugs?</p> <p>21 A. No.</p> <p>22 Q. And that WAC also appears in the FDB</p>	<p style="text-align: right;">Page 249</p> <p>1 Q. Yes.</p> <p>2 A. I don't believe I was.</p> <p>3 Q. And that's because you were not involved</p> <p>4 in Medicaid?</p> <p>5 A. Correct.</p> <p>6 Q. And did you have any involvement with</p> <p>7 Medicaid rebates?</p> <p>8 A. No.</p> <p>9 Q. Did you ever consider using a rebate</p> <p>10 program for the Medicare drugs?</p> <p>11 A. I was -- I had operational responsibility</p> <p>12 for implementing what we had. I think there may have</p> <p>13 been other people in the agency who might have been</p> <p>14 thinking about it, but I wasn't involved with that.</p> <p>15 Q. Who were those people?</p> <p>16 A. Again, as I said earlier, there was a</p> <p>17 report from the Office of Strategic Planning that</p> <p>18 laid out a whole variety of rebate models. So that</p> <p>19 typically would have been the group that would have</p> <p>20 been thinking about how you reform the program,</p> <p>21 people in the Office of Strategic Planning.</p> <p>22 Q. What is the Office of Strategic Planning</p>

<p style="text-align: right;">Page 262</p> <p>1 MR. DRAYCOTT: Objection.</p> <p>2 THE WITNESS: Correct.</p> <p>3 BY MR. MERKL:</p> <p>4 Q. All right. Now, when a -- well, when a</p> <p>5 generic manufacturer attempted to introduce a</p> <p>6 competing generic with an existing brand drug into</p> <p>7 the market, it would have to account for the</p> <p>8 existence of that spread in setting its price,</p> <p>9 wouldn't it?</p> <p>10 MR. DRAYCOTT: Objection.</p> <p>11 MR. LIBMAN: Objection. This is</p> <p>12 Mr. Libman.</p> <p>13 THE WITNESS: I don't know enough about</p> <p>14 how drug companies set prices to offer a response.</p> <p>15 BY MR. MERKL:</p> <p>16 Q. Okay. All right. Why don't we take a</p> <p>17 break.</p> <p>18 THE VIDEOGRAPHER: This is the end of tape</p> <p>19 four. Off the record at 4 o'clock.</p> <p>20 (Recess.)</p> <p>21 THE VIDEOGRAPHER: This is the beginning</p> <p>22 of tape number five in the deposition of</p>	<p style="text-align: right;">Page 264</p> <p>1 A. Correct.</p> <p>2 Q. And it addresses the proposed new AWP</p> <p>3 that the DOJ was suggesting you use as a basis for</p> <p>4 reimbursement, correct?</p> <p>5 A. Correct.</p> <p>6 Q. Do you recall seeing this letter?</p> <p>7 A. No.</p> <p>8 Q. In or about 2000?</p> <p>9 A. I don't recall seeing it.</p> <p>10 Q. Earlier you told me when HCFA decided not</p> <p>11 to go ahead and use the DOJ AWP that it was in</p> <p>12 response in part to concerns expressed by Congress.</p> <p>13 Do you recall that?</p> <p>14 A. That's correct. I did say that.</p> <p>15 Q. Does this letter reflect the concerns you</p> <p>16 were telling me about before or is this something</p> <p>17 else?</p> <p>18 A. This would be exactly the kind of concerns</p> <p>19 that Congress would express.</p> <p>20 Q. Now, when you say you don't recall this</p> <p>21 letter, do you have any reason to believe one way or</p> <p>22 the other whether you saw it or did not see it at the</p>
<p style="text-align: right;">Page 263</p> <p>1 Dr. Berenson. On the record at 4:09.</p> <p>2 BY MR. MERKL:</p> <p>3 Q. Doctor, would you take a look at Exhibit</p> <p>4 446 marked by Abbott's counsel earlier today, please.</p> <p>5 And if you look at the bottom right-hand corner of</p> <p>6 the page, in the numbers ending 2762, is a letter</p> <p>7 from Congress of the United States.</p> <p>8 A. Okay.</p> <p>9 Q. And the first letter -- the letter I'm</p> <p>10 going to talk about in Exhibit 446 is a letter dated</p> <p>11 September 27th, 2000, with counsel stamp AWP 039-2762</p> <p>12 through 2763, and it's on the letterhead of Edolphus</p> <p>13 Towns. Do you see that letter?</p> <p>14 A. Yes.</p> <p>15 Q. This is a letter from the Congressional</p> <p>16 Black Caucus, is that correct?</p> <p>17 A. I presume, but looking at some of the</p> <p>18 names -- do they say they are from -- yes. I don't</p> <p>19 know -- I assume that's right, but I don't really --</p> <p>20 Q. To Secretary Shalala?</p> <p>21 A. Yes.</p> <p>22 Q. Dated September 27, 2000, correct?</p>	<p style="text-align: right;">Page 265</p> <p>1 time. Is this the type of thing you would have seen?</p> <p>2 A. No. It went to Donna Shalala, who was not</p> <p>3 CMS. So if it had gone to our administrator, I</p> <p>4 probably would have seen it. It might have been</p> <p>5 routed to somebody at CMS, but this would not be</p> <p>6 something I would more likely see, because it goes to</p> <p>7 the department. I mean, it wouldn't be something I</p> <p>8 would routinely see, because it would be -- that</p> <p>9 response to it would be handled at the department and</p> <p>10 it would be less likely that I would be involved in</p> <p>11 it, although I might have been. I just don't</p> <p>12 remember.</p> <p>13 Q. But does this letter accurately reflect</p> <p>14 concerns that you became -- that you were made aware</p> <p>15 of that Congress was expressing about the change?</p> <p>16 MR. DRAYCOTT: Objection.</p> <p>17 THE WITNESS: This is the kind of concern</p> <p>18 when I said earlier that politics became a factor,</p> <p>19 this is the kind of thing I'm referring to. Yes.</p> <p>20 BY MR. MERKL:</p> <p>21 Q. Well --</p> <p>22 A. And I'm not saying politics in a</p>

<p style="text-align: right;">Page 266</p> <p>1 pejorative sense.</p> <p>2 Q. For instance, if we look at the second</p> <p>3 paragraph of the letter from Congressman Towns, he</p> <p>4 says, "this pricing change directed by HCFA will</p> <p>5 result in a 66 percentage in the respiratory</p> <p>6 medication Albuterol. This reduction will</p> <p>7 effectively force the current Medicare providers of</p> <p>8 home respiratory medication out of business and</p> <p>9 eliminate this benefit to the African-American</p> <p>10 community." Is he correct?</p> <p>11 MR. DRAYCOTT: Objection.</p> <p>12 MS. ALBEE: Objection.</p> <p>13 THE WITNESS: I have no idea if he is</p> <p>14 correct. Just the fact that it's here doesn't make</p> <p>15 it correct, but it's -- I don't know.</p> <p>16 BY MR. MERKL:</p> <p>17 Q. But you have no reason and you had no</p> <p>18 evidence at the time to suggest he wasn't telling the</p> <p>19 truth here, right?</p> <p>20 MR. DRAYCOTT: Objection.</p> <p>21 THE WITNESS: A lot of this -- I have no</p> <p>22 reason to think that he is wrong about the 66 percent</p>	<p style="text-align: right;">Page 268</p> <p>1 tell me is this the type of concern that was in fact</p> <p>2 expressed to you in or about 2000 about the potential</p> <p>3 use of DOJ AWP's?</p> <p>4 A. This is the type of concern that was being</p> <p>5 expressed. Yes.</p> <p>6 Q. And the substance of what's in here in</p> <p>7 fact was expressed to you, correct?</p> <p>8 A. For cancer drugs, yes.</p> <p>9 Q. And again, you took these concerns</p> <p>10 seriously, right?</p> <p>11 MR. DRAYCOTT: Objection.</p> <p>12 THE WITNESS: Any letter from Congress,</p> <p>13 you take seriously.</p> <p>14 BY MR. MERKL:</p> <p>15 Q. And this letter here, this July 20th</p> <p>16 letter and the letter that we just looked at from the</p> <p>17 black -- Congressional Black Caucus were in fact two</p> <p>18 of the reasons that you elected to continue using the</p> <p>19 AWPs as published in the Red Book and Blue Book for</p> <p>20 reimbursement of Medicare rather than going with the</p> <p>21 DOJ numbers, correct?</p> <p>22 MR. DRAYCOTT: Objection.</p>
<p style="text-align: right;">Page 267</p> <p>1 reduction, that's verifiable, a projection about</p> <p>2 people going out of business and eliminating care for</p> <p>3 the African-American community, I don't have any</p> <p>4 prior assumption whether this is correct or not</p> <p>5 correct.</p> <p>6 BY MR. MERKL:</p> <p>7 Q. Well, isn't it fair to say that this was a</p> <p>8 concern as expressed by Congress that you would have</p> <p>9 to take seriously?</p> <p>10 A. Absolutely.</p> <p>11 MR. DRAYCOTT: Objection.</p> <p>12 BY MR. MERKL:</p> <p>13 Q. And you did take it seriously?</p> <p>14 A. We did take it seriously.</p> <p>15 Q. Would you take a look at the next letter,</p> <p>16 please, starting at page AWP 039-2765. Again, to</p> <p>17 Secretary Shalala from members of Congress. The</p> <p>18 first one is Pete Sessions.</p> <p>19 A. Yes.</p> <p>20 Q. Do you recognize this letter?</p> <p>21 A. No.</p> <p>22 Q. Would you just take a look through it and</p>	<p style="text-align: right;">Page 269</p> <p>1 THE WITNESS: Yes. That's correct.</p> <p>2 BY MR. MERKL:</p> <p>3 Q. Would you take a look at the next letter,</p> <p>4 please. This is a letter from the Senate dated</p> <p>5 August 1st, 2000. To Secretary Shalala from John</p> <p>6 Breaux, Orrin Hatch, Bill Frist, Mary Landrieu and</p> <p>7 Max Baucus. Take a look. Do you recall this letter?</p> <p>8 A. No.</p> <p>9 Q. You don't recall seeing it?</p> <p>10 A. No.</p> <p>11 Q. Would you take a look, and tell me if you</p> <p>12 recall being aware of the sum and substance of the</p> <p>13 concerns being expressed in this letter?</p> <p>14 A. I actually hadn't heard a couple of these</p> <p>15 concerns.</p> <p>16 Q. Which ones are they?</p> <p>17 A. The impact on First DataBank's current</p> <p>18 contract with subscribers, the effect on private</p> <p>19 insurance contracts. The impact of reloading data on</p> <p>20 to computers for HCFA. And again, private insurance</p> <p>21 companies. So those concerns, I wasn't generally</p> <p>22 aware of.</p>